FILED
JUL 18 1940
CHARLES ELMORE CROPLEY
CLERK

No. 252

311
5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

Bri-Ca

J. R. BRINKLEY, Petitioner

vs.

MORRIS FISHBEIN, Respondent

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

WILL A. MORRISS
San Antonio, Texas
Counsel for Petitioner.

MORRISS & MORRISS,
WILL A. MORRISS, Jr.
San Antonio, Texas

PHIL B. FOSTER,
Del Rio, Texas
Of Counsel.

SUBJECT INDEX

Pages

Petition for Writ of Certiorari:

Summary of Matter Involved 2- 7

Basis of Jurisdiction to Review 7- 8

Questions Presented 8-11

Reasons Relied on for Allowance of Writ 11-17

Authorities:

1: That accusation and fact statement not reasonable and fair comment 11-12

2: Holding contrary other opinions Circuit Courts of Appeal 12, 13

3: That acts of private citizen or physician not public concern 13

4: That opinion invades jury province 13-14

5: That refusal to consider exclusion of evidence error 14-15

6: That admission of deposition in former suit error 15-16

Prayer 17, 18

Brief in Support of Petition for Writ of Certiorari:

Jurisdiction (reference back) 19

Statement of the Case 19-22

Specifications of Error 23-27

Remarks and Additional Authorities 28-30

Conclusion and Signature 30

Appendix 31-33

122617

TABLE OF CASES CITED

Pages

Belo & Co. vs. Looney, 112 Tex. 160; 246 S. W. 777 11
Brewer vs. Cochran, 99 S. W. 1033 16
Brinkley vs. Fishbein, 110 Fed. (2d) 62 6
Burrage vs. Red Arrow Taxi Co., 123 S. W. (2) 731 29

Caller Times Pub. Co. vs. Chandler, 122 S. W. (2) 249; affd. 130 S. W. (2) 853 29
Central Tex. Mutual Life Ass'n vs. Parrish, 23 S. W. (2) 780 16
Chesterfield Mfg. Co. vs. Leota Cotton Mills, 194 Fed. 358 15
Collins vs. Tansey, 126 Atl. 536 15
Commonwealth vs. Leach, 30 N. E. 163 15
Consolidated Paper Co. vs. Crockett, 181 S. E. 158 14
Corrigan vs. United States, 82 Fed. (2d) 106 16
Cox vs. United States, 103 Fed. (2d) 133 16

Democrat Pub. Co. vs. Jones, 83 Tex. 302; 18 S. W. 652 13

Employers Liability Ins. Corp. vs. Williams, 293 S. W. 210 16
Engstrom vs. DeWitt, 58 Fed. (2d) 137, 138 ..... 15, 29
Express Pub. Co. vs. Lancaster, 2 S. W. (2) 833 11

Farmers & Mech. Nat'l Bank vs. Hanks, 104 Tex. 320; 137 S. W. 1120 ..... 13, 30
Ferguson vs. Houston Press, 1 S. W. (2) 387; affd. 12 S. W. (2) 125 12

GH&SA vs. American Gro. Co., 122 Tex. 1; 36 S. W. (2) 985 29
Gen'l Life Ins. Co. vs. Potter, 124 S. W. (2) 409 16
Gulf Cas. Co. vs. Fields, 107 S. W. (2) 661 16
Gunning vs. Cooley, 281 U. S. 90; 74 L. Ed. 720 ..... 15, 29

TABLE OF CASES CITED—Continued

Pages

Grinninger vs. Philpot, 11 Fed. Case No. 5852 14

Haglage vs. Monark Gasoline Co., 298 S. W. 117 14
Houston Chronicle Pub. Co. vs. Tiernan, 171 S. W. 542 13

Jenkins vs. Taylor, 4 S. W. (2) 656 ..... 12, 13

Luke vs. United States, 84 Fed. (2d) 823 16

M. K. & T. Ry Co. vs. Patterson, 164 S. W. 442 15
Moore vs. Leverett, 52 S. W. (2) 252 11
McAndrews vs. Chicago, etc. Ry., 162 Fed. 856 14

Post Pub. Co. vs. Hallam, 59 Fed. 530 12
Pounds vs. Minter, 13 S. W. (2) 351 16
Prudential Ins. Co. vs. Bialkowski, 85 Fed. (2d) 880 16

Reeve vs. Dennett, 11 N. E. 938 15
Rood vs. Dutcher, 120 N. W. 772 ..... 13, 30

San Antonio Light Pub. Co. vs. Lewy, 113 S. W. 574 13

T. & N. O. Ry. Co. vs. Glass, 107 S. W. (2) 924 15
Times Pub. Co. vs. Ray, 1 S. W. (2) 471; affd. 12 S. W. (2) 165 13

United States vs. Monger, 70 Fed. (2d) 361 16

Washington Times vs. Bonner, 86 Fed. (2d) 836; 110 A. L. R. 393 ..... 12, 13
Watson vs. St. Paul City Ry. Co., 79 N. W. 308 14
Weston vs. Stammers, 1 L. Ed. 11 14
Williamson vs. Tex. Ind. Ins. Co., 127 Tex. 71; 90 S. W. (2) 1088 29

TABLE OF STATUTES CITED

Pages

Federal Rule of Civil Procedure 26 (d) (4) 9, 14

Revised Civil Statutes of Texas, Art. 5430 31

Revised Civil Statues of Texas, Art. 5431 ..... 8, 23, 31

Revised Civil Statutes of Texas, Art. 5432 ..... 8, 23, 32, 33

Revised Civil Statutes of Texas, Art. 5433 33

USCA title 28, sec. 347 (a) (Jud. Code 240) 8

TEXTBOOKS AND ENCYCLOPEDIAS CITED

35 C. J. 1285, sec. 291 12

McCormick & Ray on Texas Law of Evidence, p. 819 16

McKelvey on Evidence (2d Ed.) p. 238 16

19 Tex. Jur. 354 16

27 Tex. Jur. 668, n. 7 13

27 Tex. Jur. 672, sec. 47 13

No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

J. R. BRINKLEY, Petitioner

vs.

MORRIS FISHBEIN, Respondent

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

To the Honorable the Supreme Court of the United States:

John R. Brinkley presents this his petition for writ of certiorari, respectfully showing:

MATTER INVOLVED

The action is for libel. Petitioner, as plaintiff, filed this action April 23, 1938, against respondent, Morris Fishbein, in the District Court of Val Verde county, Texas, for damages for libel; cause was removed on petition of respondent to, and tried in, the United States District Court for the Western District of Texas, Del Rio Division.

Petitioner is a physician and surgeon, engaged in private practice as a specialist in prostatic trouble; has been practicing medicine since 1915; had practiced at Milford, Kansas, from 1917 to the end of 1932, at which time he moved to Del Rio, Texas, where he maintained his residence, his practice and his private hospital for his patients until the end of the year 1937, when he discontinued his hospital at Del Rio and opened two hospitals at Little Rock, Arkansas, where he has since continued his practice, operating there these private hospitals for his patients, but continuing his residence in Del Rio.

The matter complained of as libelous was written and signed by respondent, and published in February, 1938, HYGEIA, a monthly magazine of the American Medical Association, of which respondent was editor.

The published article was headed "MODERN MEDICAL CHARLATANS: II" (being the second of a series of articles under that title), and the portions on which

petitioner declared (R. 2-7) are (Exh's 1-4, R. pp. 601-7):

"JOHN R. BRINKLEY

In John R. Brinkley, quackery reaches its apotheosis . . . He continues to demonstrate his astuteness in shaking shekels from the pockets of credulous Americans, notwithstanding the efforts of various governmental departments and agencies . . .

"When his radio station was removed he departed for Mexico, obtaining a license from the Mexican government. Now he broadcasts from Station XERA at Villa Acuna, Mexico, just across from Del Rio, Texas. All sorts of efforts have been made to remove him from the air but apparently without success. Right now he is not doing much in the way of goat gland transplanting. He reads the symptoms of patients and then by remote control prescribes the pill that they should use. You send him your dollar, and you get your pill. In addition, of course, he has a hospital in Del Rio where he performs some peculiar operations. The main one is the compound prostate operation for elderly gentlemen in which he merely injects a little mercurochrome into the tubes passing from the male sex glands. He has a high pressure man in his front office who makes sure that those who come to the hospital will have the money to pay in advance for the work. They are able to develop mortgages, loans and conversion of securities in order to permit the patient to pay on the nail for what he is going to get. Most of the business, however, seems to come by way of the mail, and it is time for the Postoffice

Department to do something in regard to the use of the United States mails by John R. Brinkley in his defrauding of the public . . .

"The evidence assembled indicates that at various times, Brinkley has made as much as $55,000 a week from his various quackeries. He has been the possessor of three fine yachts. He travels abroad and returns to this country in the finest suites on the finest boats, accompanied by his family and the little boy's tutor. On the vessel going and coming neither he nor Mrs. Brinkley engage in conversation with the passengers. His name is too widely known for what he is to make him want to take the chance of what will happen when the passengers learn the names of their trans-Atlantic acquaintance. Yet the money rolls in, which proves that the wages of sin is not always death."

Respondent answered (R. 10-28), in addition to his admissions and denials (pars. 1-5, R. 10-19) admitting publication of the article, alleging (pars. 6-13, R. 19-28) the truth of the statements, and that the publication was qualifiedly privileged as having been published in an organ of the American Medical Association in performance of an alleged duty to the public and to members of said association, in good faith and without malice, and also as fair and reasonable comment on matter of public interest and discussion; and, in mitigation, his prior information concerning the statements, and his belief they were true.

The gist of the evidence for petitioner, in brief summary, aside from formal matters, such as the publication, circulation, etc., and reputation, was that, through long

practice, experience, research and experimentation, petitioner had evolved and uses an expert technique, by way of a simple operation successful in 85 to 95% of cases, avoiding the more severe and dangerous removal operation, for relief of men suffering from enlarged and diseased prostates; that since establishing his hospital in Del Rio, at the beginning of 1933, petitioner had practically devoted his practice to that specialty, during which time he had received around 15,000 patients in his hospitals, and *before coming to Del Rio*, five years before this publication, *he had abandoned and had not since performed any gland transplantation operation;* that on receiving patients at the hospital each is given exhaustive physical and clinical examination with the most modern equipment therefor, before treatment, and only cases appropriate are operated; and that, while he advertises his technique, by radio and by answering correspondence, his practice is legitimate and beneficial, and he does not use the mails to defraud, nor in any manner defraud his patients.

Aside from much documentary proof in the way of advertising matter put out by petitioner while practicing in Kansas, and brief excerpts from his biography, and one or two pamphlets put out since 1933, and aside from a deposition taken in another case in January 1932, of one witness (a convict in Oklahoma penitentiary) to an incident relating to petitioner's practice in Greenville, South Carolina, in 1913, the material testimony for respondent consisted of that of himself and three other experts to the

effect that petitioner's prostate operation is, in their opinion, of no effect.

The cause was tried in March, 1939, before a jury. The trial court, refusing petitioner's requested charges (R. 1126-1132) submitted the case by oral charge (R. 1091-1112), overruling petitioner's exceptions thereto (R. 1113-1119). Verdict (R. 1155) resulted for respondent. The court, overruling petitioner's motion for judgment *non obstante* (R. 1156), gave judgment for respondent (R. 1158). Petitioner appealed to the Circuit Court of Appeals, Fifth Circuit, which court (Brinkley vs. Fishbein, 110 Fed. (2d) 62) affirmed the judgment below, said Court refusing to consider petitioner's assignments of error, or to review the evidence, holding, in effect, that the judgment should be affirmed without regard to errors in rulings on evidence and in charge, because the Court said, under his own admissions (recited in the opinion) petitioner was not entitled to jury issue; and that court, without additional opinion, overruled the petition for rehearing timely filed (R. 1193), wherein petitioner specified the erroneous findings and conclusions of the Circuit Court of Appeals.

The complaint here against, the grave error in, the opinion lies in the fact that it summarily invades the clear province of the jury in holding that petitioner's testimony shows the truth of the statements of fact complained of, and that no evidence shows that petitioner suffered actual

damage; whereas petitioner's testimony does not admit the truth of the accusations, and did show damage, and those were jury issues, to be resolved under appropriate instructions, and on competent evidence, while the trial court had erroneously excluded from the jury competent and material evidence offered for petitioner, and had submitted to the jury materially erroneous charges. The Circuit Court of Appeals had no right to thus determine controverted fact issues, but should have considered the assignments, and reversed and remanded the cause for the errors, in rejection of evidence, and in charge, so that petitioner should receive his right of jury trial on appropriate rulings.

The opinion, too, holds directly contrary to the settled Texas decisions construing the pertinent Texas libel statute, in holding the charges complained of as libelous to be privileged, that is, that they, although including *accusations* and *fact statements*, (charging arch quackery, fraud, corruption, and guilt of the crime of using the United States mails to defraud, and of swindling) are reasonable and fair comment, whereas such statements are never privileged as "reasonable and fair comment", under the Texas decisions construing the Texas libel law,—nor, indeed, under the Federal rule. The Texas decisions cited in the opinion as supporting the opinion do not do so, but settled construction is to the contrary. Warrant for these just complaints will be manifest under appropriate head hereinafter.

BASIS OF JURISDICTION TO REVIEW

Jurisdiction in trial court was based on diversity of citizenship, petitioner being a citizen of Val Verde county, Texas, respondent of Cook county, Illinois; the damages sought, actual and exemplary, being for $250,000.00

The Circuit Court of Appeals rendered its decision affirming the judgment below on March 1, 1940 (R. 1165); petition for rehearing filed March 22, 1940 (R. 1170); considered and overruled, without additional opinion, April 19, 1940 (R. 1193); this petition for certiorari is filed within three months from date of overruling petition for rehearing.

The jurisdiction of this Court is invoked under Judicial Code 240, as amended by Act of February 13, 1925, 43 Stats. 938, USCA title 28, sec. 347 (a). The jurisdiction of the Circuit Court of Appeals is not made final, but this Court is "competent . . . to require by certiorari . . . that the cause be certified."

QUESTIONS PRESENTED

These are:

1: Whether, under the Texas Libel Statute (arts. 5431 and 5432, Rev. Civ. Stats. of Texas, as amended 1927 by Acts 40th Leg. of Texas, reg. sess. p. 121, ch. 80—*see appendix, infra*), published accusation and defamatory fact statement against a professional man (a practicing physician) that he is practicing arch quackery, is corrupt and practicing fraud in defrauding his patients and the public by taking money for an inefficacious technique, and is guilty of the crime of using the United States mails to defraud, and his practice a sin, are privileged as reasonable and fair comment and opinion, regardless of their truth. The Circuit Court of Appeals so held.

2: Whether, under the Texas Libel Statute aforesaid, the acts and practices of petitioner, merely a private medical

practitioner, in conducting his practice as such, are matter of public concern. The Circuit Court of Appeals so held.

3: Whether, under authority of Federal Rule of Civil Procedure 26, (d) (4), deposition taken in 1932, in a different suit, in another State, not involving the same transaction, nor subject matter, but wherein petitioner sued respondent and another, for libel published in 1930, dissimilar in sundry respects to the libel here charged, and which suit was dismissed in 1934 (by which deposition evidence from a witness to prejudicial acts of petitioner occurring in 1913, denied by petitioner, was received in evidence for respondent for this suit—and without proof that the deposition was used in evidence in the former suit, or of the non-availability of the witness to testify in this suit) was competent evidence against petitioner on trial herein.

4: Whether, in suit by a physician for libel in publication charging that such physician was practicing but arch quackery and fraud, and using the United States mails to defraud in taking money from credulous patients without benefit to them for an inefficacious prostate gland operation, it was competent, after defendant had, on trial, adduced evidence from experts that in their opinion the operation was of no efficacy, for plaintiff to adduce proof, in rebuttal, from his patients shown to have received the operation, of their symptoms (shown to be symptoms of prostatic sufferers) prior to the operation, and their freedom from such symptoms and suffering since, as tending to disprove the charges of inefficacy and fraud. The proof, from sixteen such witnesses, was offered, (by way of fact statements, and not as opinion) but the trial court excluded it, and the Circuit Court of Appeals affirmed without considering the pertinent assignment.

5: Whether, in suit by a physician for libel in magazine article charging that such physician was practicing but arch quackery and fraud, and using the United States mails to defraud, in taking money from credulous patients, for inefficacious prostate gland operation, the mere fact plaintiff admitted he had nearly twenty-five years previously obtained medical diploma from a school termed a diploma mill, had later experimented with and advertised and practiced goat gland transplantation for rejuvenation, and that some eight years before the publication his radio license, and his license to practice in two states, had been revoked, and that he had been indicted (though never tried) in another state for conspiracy to unlawfully practice medicine, and that at the time of the publication he was an advertising doctor, by pamphlet and over the radio, should have the legal effect to preclude his right of recovery, notwithstanding the testimony in his behalf was that since he established his hospital and began practice in Texas five years before the publication he had not practiced the transplantation operation, but had, after many years practice and research, practiced as a specialty the prostate gland operation, of milder technique and less dangerous than those known as the removal and reaming operations on that gland, and that all his patients received, on entering the hospital, complete detailed physical examinations, and thousands had received the operation and been relieved and benefitted and that this practice was the result of long study, experience and scientific experimentation, and, including his use of the mails, was legitimate, and beneficial to prostate sufferers, and not a fraud, albeit he continued advertising. The Circuit Court of Appeals held that the gist of the published charges was that plaintiff was a charlatan, a quack, and that the fact of his trans-

gression of the standard of ethics of the profession support the charge of quackery as reasonable and honest opinion, and that, without regard to errors assigned against the rulings of the trial court, the judgment should be affirmed for such reason.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals, in construing the Texas libel statute, which statute privileges only "reasonable and fair comment or criticism" held that "the publication (in question) was privileged". Not only do the two Texas cases cited in the opinion to support the conclusions *not* support them, nor relate to the question, but the settled doctrine of the Texas decisions is that fact statements and accusations (of corruption, crime, dishonesty, and the like) are never allowed as comment or criticism, but as to all such statements and accusations the only defense is truth,—privilege does not extend to the making of false statements of fact, even though made in good faith, and with reasonable cause to believe it true; accusations or statements of fact published must be substantially true in all respects, and are not privileged. The Circuit Court of Appeals, therefore, decided an important question of Texas law in direct conflict with applicable Texas decisions, by which decisions it was bound.

A. H. Belo & Co. vs. Looney (Tex. Sup.) 112 Tex. 160; 246 S. W. 777, 783;

Express Pub. Co. vs. Lancaster, (Tex. Com. App.) 2 S. W. (2) 833, 834 (superseding prior opinion in 285 S. W. 810);

Moore vs. Leverett (Tex. Com. App.) 52 S. W. (2) 252, 255;

Jenkins vs. Taylor (Tex. Civ. App.—wr. dism.) 4 S. W. (2) 656, 658;
Ferguson vs. Houston Press (Tex. Civ. App.) 1 S. W. (2) 387, 393; affd. 12 S. W. (2) 125;
Cf. for Federal rule:
35 C. J. 1285, sec. 291;
Post Pub. Co. vs. Hallam, 59 Fed. 530, 539-542;
Washington Times vs. Bonner, 86 Fed. (2) 836, 110 A. L. R. 393.

The publication here in question charged on plainly accuses petitioner, a private medical practitioner, with corruption, cheating and defrauding his patients, and with the crime of using the United States mails to defraud; is defamatory and denunciatory; and this injurious misconstruction of the Texas privilege statute in relation to publication is of vital concern to the liberty of every citizen, and should not be allowed to pass uncorrected.

(2) The Circuit Court of Appeals, in holding that the accusations and purported fact statements in the publication complained of, to-wit, that petitioner, a physician, is practicing arch quackery and defrauding the public and his patients, and is guilty of the crime of using the United States mails to defraud, and his practice sinful, are priviledged as reasonable and honest opinion; has rendered a decision in conflict with the decison of another Circuit Court of Appeals and of this Court on the same matter, and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision.

35 C. J. 1285, sec. 291;
Post Pub. Co. vs. Hallam, 59 Fed. 530, 539-542 (Sixth Circuit, Mr. Justice Taft);

Washington Times vs. Bonner, 86 Fed. (2) 836, 110 A. L. R. 393.

3. The Circuit Court of Appeals, in holding that the published statements and accusations in question against petitioner, a purely private citizen, in private life, not a candidate nor public official, "was a matter of public concern", decided an important question of local law in a way in conflict with applicable local decisions and contrary to the intent of the legislative act, injuriously to the rights of every citizen; and such misconstruction should not be allowed to pass uncorrected.

Democrat Pub. Co. vs. Jones (Tex. Sup.) 83 Tex. 302, 307; 18 S. W. 652;
Houston Chronicle Pub. Co. vs. Tiernan (Tex. Civ. App.) 171 S. W. 542;
Times Pub. Co. vs. Ray (Tex. Civ. App.) 1 S. W. (2) 471; affd. 12 S. W. (2) 165;
Jenkins vs. Taylor, supra;
San Antonio Light Pub. Co. vs. Lewy (Tex. Civ. App.—wr. ref.) 113 S. W. 574;
Rood vs. Dutcher (S. D. Sup.) 120 N. W. 772;
Farmers & Mech. Nat'l Bank vs. Hanks (Tex. Sup.) 104 Tex. 320, 137 S. W. 1120;
Cf. 27 Tex. Jur. 668, n. 7; ib 672, sec. 47.

4. Petitioner's specification of error No. 17, in the Circuit Court of Appeals (propositions 8-10, pp. 64-79, Br. for Appellant in that court) complaining of the trial court's admission in evidence of the deposition of respondent's witness James E. Crawford, taken in a different suit, not involving the same transaction, nor subject matter (namely, Cause No. 6949 in the district court of Geary county, Kansas, which suit was filed in 1930, dismissed 1934, through which deposition, taken in 1932, evidence

was received herein from said witness of prejudicial acts of petitioner in Tennessee in 1913, under purported authority of Federal Rule of Civil Procedure 26 (d) (4), presented material error on controverted issue; and the Circuit Court of Appeals should have considered such assignment and reversed for such error in admitting such deposition. Such error, misconstruing Federal Rule 26 (d)

(4) should be reviewed.

Federal Rule of Civil Procedure 26 (d) (4);
Haglage vs. Monark Gasoline Co. (Mo.) 298 S. W. 117, 120;
Grinninger vs. Philpot, 11 Fed. Case No. 5852;
Consolidated Paper Co. vs. Crockett, (Ga.) 181 S. E. 158;
Weston vs. Stammers, (Pa.) 1 L. Ed. 11;
McAndrews vs. Chicago, etc., Railway, 162 Fed. 856, 858, the Seventh Court;
Watson vs. St. Paul City Ry Co. (Minn.) 79 N. W. 308.

5. The Circuit Court of Appeals, in holding that it was "spared the necessity of discussing the assignments of error in detail and of reviewing the evidence"—in refusing to consider petitioner's specifications of error—and in concluding that "the evidence of plaintiff . . . tends to show the truth of the statements of facts complained of, and we find no substantial evidence tending to show defendant was actuated by malice, or that plaintiff suffered any actual damage compensatable in money", ignored substantial evidence, both of malice and money damage, and clearly invaded the province of the jury on the subject of the truth of the charges of corruption and fraud, and the crime of using the United States mails to defraud, and of sinful practice, and of the inefficacy of petitioner's pros-

tate operation, and as well of quackery in his practice at the time of the publication,—the evidence making a case for the tryers of fact; and this state of the record required that the assignments of error be passed on. The conclusion was a clear invasion of the province of the jury, and the unwarranted substitution of the judgment of that court, against the right to jury finding on controverted issues, under correct rulings, on evidence and in charge.

Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Engstrom vs. DeWitt (8th C.) 58 Fed. (2) 137, 138;

6. Petitioner's specifications of error Nos. 1 to 16, inclusive, in the Circuit Court of Appeals (Br. for Appellant in that court pp. 12-25), complaining of the trial court's exclusion of the testimony of witness I. F. Ingram and 15 others offered in rebuttal of the testimony of experts for respondent, in effect that each of those witnesses had undergone petitioner's prostate operation, prior to which they had long suffered all symptoms—admitted to be such—of prostate gland enlargement, and since which they had felt no such symptoms, presented material error on controverted issue; and the Circuit Court of Appeals should have considered such assignments and reversed for such error.

Collins vs. Tansey, 126 Atl. 536 (Ct. of Errors & Appeals, N. J.)
Reeve vs. Dennett, 11 N. E. 938 (Mass.)
Commonwealth vs. Leach, 30 N. E. (Mass.) 163
Chesterfield Mfg. Co. vs. Leota Cotton Mills, 194 Fed. 358 (4th Cir.)
M. K. & T. Ry. Co. vs. Patterson, 164 S. W. 442, (Tex. Civ. App.)
T. & N. O. Ry. Co. vs. Glass, 107 S. W. (2) 924, (Tex. Civ. App.)

Brewer vs. Cochran, 99 S. W. 1033, (Tex. Civ. App.)
Pounds vs. Minter, 13 S. W. (2d) 351 (Tex Com. App.)
Luke vs. United States, 84 Fed. (2) 823 (5th Cir.)
Cox vs. United States. 103 Fed. (2) 133 (7th Cir.)
Prudential Ins. Co. vs. Bialkowski, 85 Fed. (2) 880 (4th Cir.)
Corrigan vs. United States, 82 Fed. (2) 106 (9th Cir.)
United States vs. Monger, 70 Fed. (2) 361 (10th Cir.)
Central Tex. Mutual Life Assn. vs. Parrish, 23 S. W. (2) 780, (Tex. Civ. App.)
General Life Ins. Co. vs. Potter, 124 S. W. (2) 409 (Tex. Civ. App.)
Employers Liability Ins. Corp. vs. Williams, 293 S. W. 210.
Gulf Cas. Co. vs. Fields, 107 S. W. (2) 661; (Tex. Civ. App.)
19 Tex. Jur. 354:
McCormick & Ray on Texas Law of Evidence, p. 819;
McKelvey on Evidence, (2nd Ed.) p. 238.

7. Petitioner's specifications of error Nos. 27-28, in the Circuit Court of Appeals, (Br for Appellant in that court, pp. 30-36, same as assignments Nos. 15 and 16 pp. 11-17, Motion for Rehearing) complaining of the trial court's charge that reasonable and fair comment or criticism is priviledged, whereas the defamatory and denunciatory charges complained of that petitioner is an arch-quack, cheating and defrauding his patients by taking money for a useless technique, and guilty of the crime of using the United States Mails to defraud, and his practice a sin in effect deserving death, and the like, may not in law be considered reasonable and fair comment or criticism, but constitute statements of purported fact and accusation just-

ified only by proof of truth thereof, which the trial court refused to charge, presented material and prejudicial error: and the Circuit Court of Appeals should have considered such assignments and reversed for such error, and its refusal so to do should be reviewed. (See authorities p. 11-12 supra Reason No. 1).

8. Petitioner's specifications of error No. 29, in the Circuit Court of Appeals (Br. for Appellant in that court pp. 37-38, discussed pp. 111-117, same as assignment No. 17 pp. 18-20, Motion for Rehearing.) complaining of the trial court's charge (R-1099-1101) on privilege, that if the matter was one of public concern it was privileged, and refusing to tell the jury that the purported statements of facts and defamatory accusations were not to be considered reasonable and fair comment or criticism, and hence were not privileged, but could only be justified by proof of truth thereof, presented material and prejudicial error: and the Circuit Court of Appeals should have considered such assignments and reversed for such error, and its refusal so to do should be reviewed. (See authorities p. 12-13 supra Reason No. 2).

WHEREFORE, petitioner prays that writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court complete transcript of the record and the proceedings of said Court had in the case numbered and entitled on its docket No. 9230, J. R. Brinkley, Appellant, vs. Morris Fishbein, Appellee, that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court and the cause re-

manded; and for such further relief as to this court may seem proper.

Dated: July 16, 1940.

WILL A. MORRISS
San Antonio, Texas
Counsel for Petitioner.

MORRISS & MORRISS,
WILL A. MORRISS, Jr.
San Antonio, Texas

PHIL B. FOSTER,
Del Rio, Texas
Of Counsel.